INDUSTRY CIRCULAR

DEPARTMENT OF
THE TREASURY
Bureau of Alcohol, Tobacco and Firearms
Washington, D. C. 20226
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TRADE PRACTICE ENFORCEMENT

Distilled Spirits Plants, Wineries, Brewers, Wholesalers and Importers of Alcoholic Beverages, and Others Concerned:

PURPOSE. The purpose of this circular is to advise members of the regulated industries of the position of the Bureau of Alcohol, Tobacco and Firearms (ATF) concerning the establishment of "exclusion in whole or in part" in exclusive outlet, tied house, and commercial bribery investigations under the Federal Alcohol Administration Act ("FAA Act"), 27 U.S.C. § 205(a), (b), and (c). Guidance to the industry is necessary in this area due to the decision in Fedway Associates, Inc., et al. v. United States Treasury Department, Bureau of Alcohol, Tobacco and Firearms, 976 F.2d 1416 (D.C. Cir. 1992). The provisions on consignment sales, labeling and advertising are not affected by the decision since those provisions do not involve the element of exclusion. 27 U.S.C. § 205(d), (e), and (f).

BACKGROUND. After an extensive investigation, ATF charged Fedway Associates, Inc. (Fedway), an importer and wholesaler of alcoholic beverages, with furnishing televisions, microwaves, CD players and VCR's, among other things, to retailers to induce the retailers to purchase Finlandia vodka and Captain Morgan rum to the exclusion of alcoholic beverages offered for sale by Fedway's competitors, all in violation of the tied house and commercial bribery provisions. Following an administrative proceeding and administrative appeal to the Director, Fedway sought judicial review of the suspension of its basic permits. The United States Court of Appeals for the District of Columbia Circuit ruled in favor of Fedway.

DISCUSSION. The core issue in Fedway involved ATF's interpretation of the statutory phrase "exclusion in whole or in part." ATF argued that Fedway violated the FAA Act when it engaged in a promotion that resulted in the retailers purchasing less of a competitor's products, in whole or in part, as a result of the promotion. The court, however, held that Congress used exclusion "to indicate placement of retailer independence at risk by means of a 'tie' or 'link' between the wholesaler and the retailer or by any other means of wholesaler control."

While the Fedway court declined to articulate a specific standard or criteria pursuant to which ATF could establish exclusion under the FAA Act, there are several factors or guidelines developed in the decision which the court felt were evidence of an unlawful tie or link. Additionally, the Fedway court acknowledged the judicial precedents that have recognized certain practices as plainly threatening retailer independence. Finally, the Fedway court stressed the utility of rulemaking to define practices which result in exclusion under the FAA Act.

As a result of the Fedway decision, ATF will initiate rulemaking to identify the practices which constitute exclusion under the FAA Act. The rulemaking will develop the factors which ATF will use in determining whether a particular practice has resulted in exclusion of a competitor's products.

ATF anticipates the notice of proposed rulemaking will involve a three-tier or category approach to the question of exclusion. First, the proposed rule will identify certain practices or conduct which will be presumed to result in exclusion under the FAA Act. This category will most likely include the practices and conduct which the Federal

courts have recognized as resulting in a violation of the unfair trade practice provisions. These include: Levers v. Anderson, 153 F.2d 1008 (10th Cir. 1946) (relating to a wholesaler using indirectly majority stock ownership of a retailer to control the retailer's purchases of alcoholic beverages), Distilled Brands, Inc. v. Dunigan, 222 F.2d 867 (2d Cir. 1955) (relating to a tie-in sale where the wholesaler conditions the purchase of one distilled spirits products on the retailer purchasing another distilled spirits product at the same time), Black v. Magnolia Liquor Co., 355 U.S. 524 (1957) (relating to a tie-in sale similar to that in Distilled Brands, Inc.), and Stein Distributing Co. v. Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, 779 F.2d 1407 (9th Cir. 1986) (relating to a wholesaler control over the retailer about the placing of all the alcoholic beverage products on the premises and providing labor to reset the products on the premises).

After identifying the practices or conduct which are presumed to result in exclusion under the FAA Act, the rulemaking will identify certain types of trade practices that would be permissible regardless of their effect on the trade buyer. In essence, this would create a safe harbor area. Such an approach could be accomplished through the specific authorization in the regulations of certain promotional practices that could be utilized by industry members without fear of violating the FAA Act. It would be similar to the approach in the existing exceptions in 27 C.F.R. Part 6, but with a greater emphasis on the principles set forth in the Fedway decision in the development of such safe harbors.

The rulemaking would also establish standards or factors which would be used to determine if conduct exceeding the specific practices sanctioned in the safe harbor area would result in exclusion under the FAA Act. That is, exclusion would not occur simply by the mere fact that an industry member engaged in a practice outside the safe harbor area. Assuming such practice was not one already identified as exclusionary, ATF would evaluate the industry practice in light of such factors to determine if the practice resulted in exclusion. This tier or category of the rulemaking would include the factors which were identified in the Fedway decision. In making a determination of whether the retailer's independence is at risk by a tie or link, the Fedway court discussed factors such as the duration of the practice or promotion, the non-discriminatory feature of a practice where the promotion is available to all retailers, and the degree to which a practice involves an industry member in the day-to-day operations of a retailer. For example, a promotion running for a long period of time can threaten a retailer's independence, whereas a one-time or short-term promotional offering may not.

Although rulemaking will be initiated, ATF emphasizes that there is no enforcement holiday as a result of the Fedway decision. ATF will continue to undertake investigations, institute administrative actions against basic permits, and accept offers in compromise in situations where there is evidence of a link or tie or any other control over a retailer which threatens its independence. In making these determinations, ATF will be guided by the factors identified in the Fedway decision.

INQUIRIES. Questions concerning this circular should refer to its number and be addressed to the Chief, Market Compliance Branch, Bureau of Alcohol, Tobacco and Firearms, Washington, DC 20226.

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